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IN THE

Supreme Court of the United States

October Term 1975

No. 75-1081

THE AMERICAN TOBACCO COMPANY,

Petitioner,

v.

EDGAR RUSSELL, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Whether Section 703(h) of Title VII of the Civil Rights Act of 1964, 24 U.S.C. §2000e-2(h) exempts from the category of unlawful employment practices the application of different standards of compensation and different terms of employment to employees who work in different plants where the differences are the result of the employer's intentional exclusion of blacks from 90 per cent of the jobs in one of the plants?

2. Whether "different locations," as used in Section 703(h) of Title VII applies to two plants a) which constitute

a single manufacturing process, b) which are two miles apart, c) which are covered by the same collective bargaining agreement, d) where the company has contractually reserved and exercised the right to shift employees from one plant to another without loss of seniority, and e) where employees of one plant work at the other plant?

Statement

This case was brought pursuant to Title VII of the Civil Rights Act of 1964[1] to redress racial discrimination in employment at two plants of The American Tobacco Company in North Carolina.

These plants are:

1) The Reidsville branch of The American Tobacco Company, located in Reidsville, North Carolina (hereinafter, "Branch"), which receives tobacco from the Leaf Department, blends and manufactures cigarettes from it.

2) The Reidsville Leaf Department of the American Tobacco Company, located two miles from Branch outside the corporate limits of Reidsville but within Rockingham county (hereinafter, "Leaf"), which processes and stores green leaf tobacco until needed in Branch.

Branch is organized into two departments, prefabrication and fabrication. Prefabrication receives tobacco from Leaf and blends, cuts and dries it. The fabrication department manufactures and ships cigarettes. Blacks have been excluded from the jobs in fabrication, which pay more than the jobs in prefabrication and more than the jobs in Leaf.

Employees in Leaf are divided into two categories, regular and seasonal, performing substantially the same work. Some of the Leaf employees actually perform their work at Branch.

[1] 42 U.S.C. §§2000e *et seq.*

As of January 29, 1968, shortly after the complaint was filed, the Company employed 1814 hourly rated employees at Branch and Leaf, divided as follows:

Branch	*White*	*Black*
Fabrication	1,295 (91.5%)	120 (8.5%)
Prefabrication	58 (34.9%)	108 (65.1%)
Leaf		
Regular	33 (31.1%)	73 (68.9%)
Seasonal	3 (2.4%)	124 (97.6%)

The average wage rates were as follows:

	White	*Black*
Branch	$ 2.90	$ 2.52
Leaf	3.27	2.41

Of the twenty-six persons at Leaf occupying jobs paying more than $2.82 per hour, twenty-four were white and two were black.

The employees at Branch and the regular employees at Leaf are covered by the same collective bargaining agreement. The employees at Branch and Leaf are on separate seniority rosters. An employee at Leaf who wishes to transfer to a job at Branch loses all his seniority. However, if the Company requests transfer of an employee from one plant to another the employee retains his seniority rights. All of the employees who, at the request of man-

agement, have transferred between the two plants have been white.

The District Court found that prior to 1963 the Company had overtly excluded blacks from fabrication jobs at Branch and that this discrimination was perpetuated by a variety of devices, including a departmental seniority system and subjective evaluation of qualifications (A10-A15).[2] The court ordered seniority relief for black employees at Branch (A30-A32) but denied any seniority relief for those employed at Leaf (A32). The District Court ruled that Branch and Leaf are separate operations because they are two miles apart, different work is done at each plant and it is more efficient for the Company to keep the two operations separate. It concluded that "there is no justification in law or in fact for merging the two lines of seniority" as Branch and Leaf[3] (A8-A9).

The Court of Appeals denied black Leaf employees the right to transfer into prefabrication jobs at Branch, inasmuch as the District Court had found no racial discrimination in hiring into those jobs (A49). It held, however, that black employees at Leaf who were hired before the Company eliminated discriminatory hiring in the fabrication department of Branch should be permitted to use their company seniority to transfer to that department as permanent vacancies occur in jobs they can perform (A48).

It is this limited grant of seniority relief for the black employees at Leaf, who were previously unable to obtain jobs in the fabrication department of Branch which the Company is asking this Court to review.

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[2] This form of citation is to pages of the appendix to the Petition for Certiorari.

[3] Plaintiffs sought only an "opener" which would permit class members at Leaf one opportunity to transfer to Branch with carryover seniority.

ARGUMENT

This case does not warrant review on certiorari because the decision of the Court of Appeals is in accord with the express language of Section 703(h) and there is no conflict among the circuits on the questions presented.

The statutory provision relied upon by the Company, Section 703(h) of Title VII of the Civil Rights Act of 1964, provides in part that

> it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment . . . to employees who work in different locations, *provided that such differences are not the result of an intention to discriminate* (emphasis added).

Assuming for purposes of argument that Leaf and Branch are "different locations" the Company's seniority practices with respect to Leaf employees are not shielded from judicial alteration by Section 703(h) because the differences in treatment of the employees in the fabrication department of Branch and the employees at Leaf are the direct result of the Company's intention to discriminate, viz., its refusal to hire black employees into fabrication jobs.

The Company contends that black employees at Leaf are not entitled to seniority relief which would enable them to transfer into fabrication jobs at Branch because the Company always hired both blacks and whites at Branch and, therefore, the Leaf employees were not affected by the discriminatory priorities at Branch. The fallacy of this argument is apparent. Blacks seeking work at the Company could not obtain jobs in the fabrication department of

Branch, which jobs were reserved for whites. They were limited to the relatively small number of jobs in prefabrication or at Leaf. The fact that those who ended up at Leaf might have obtained black jobs at Branch, had there been any vacancies, in no way lessened the impact upon them of the Company's discriminatory policies.[4]

It is equally clear that the term "different location" does not apply to Leaf and Branch. They are parts of a single integrated manufacturing process and are covered by the same collective bargaining agreement. Some employees who are on the Leaf payroll actually work at Branch. The Company has contractually reserved the right to transfer employees from one plant to another without loss of seniority and has, in fact, exercised this right on several occasions.

The seniority relief granted to Leaf employees is similar to that afforded victims of discrimination in other cases involving multiple plants performing different but related functions. See, *e.g., Quarles* v. *Philip Morris*, 279 F. Supp. 505 (E.D. Va. 1968); *United States* v. *United States Steel Corp.*, 371 F. Supp. 1045 (N.D. Ala. 1973) (findings of fact and conclusion of law), 5 EPD ¶8619 (decree), *vacated and remanded on other grounds*, 520 F.2d 1043 (5th Cir. 1975). To deny such relief would be to leave victims of the most blatant discrimination, segregation by plant, without any remedy, thereby frustrating the central statutory purposes of Title VII: eradicating discrimination throughout

[4] In 1968 the hourly work force at Branch was 86% white; the hourly work force at Leaf was 85% black. That Branch and Leaf were viewed, even after 1965, as "white" and "black" plants, respectively, is evidenced by the flow of job applicants. Between July 2, 1965 and January 29, 1968, only 77 out of 313 applicants to Branch were blacks. On the other hand, all of the 46 persons hired at Leaf in the same period were black, as no whites applied for jobs at Leaf during that period.

the economy and making persons whole for injuries suffered through past discrimination *Albemarle Paper Company* v. *Moody*, 422 U.S. 405, 421 (1975).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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